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No. 99-1192

In the Supreme Court of the United States

BOBBY W. BULLOCK,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Texas Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Confrontation Clause requires the exclusion of a confession made by a non-testifying accomplice when that confession inculpates the accused.

2. Whether the Texas Court of Appeals erred in holding that the admission of the accomplice's hearsay statement did not violate the Confrontation Clause, contrary to the Court's holding in *Lilly v. Virginia*.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent State of Texas submits this brief in opposition to Bobby Bullock's petition for writ of certiorari. In his petition, Bullock asks the Court to review the decision of the First Court of Appeals at Houston, Texas, affirming his conviction for possession with intent to deliver at least 400 grams of cocaine.

Bullock complains that the admission into evidence of an unavailable accomplice's out-of-court confessions that inculpated Bullock for the offense of possession with intent to deliver violated his Sixth Amendment right to confront his accuser at trial through cross-examination in open court. Bullock asks this Court to assume jurisdiction over this matter and argues the court of appeals's decision conflicts with this

Court's decision in *Lilly v. Virginia*, 119 S.Ct. 1887 (1999) (plurality opinion).

The Court should deny Bullock's petition because the court of appeals's decision does not conflict with *Lilly*. *Id.* Rather, the court of appeals properly applied this Court's established Confrontation Clause jurisprudence. Bullock has not alleged nor established any other basis to invoke the jurisdiction of this Court. *See* SUP. CT. R. 10(b), (c).

STATEMENT OF THE CASE

On March 1, 1995, Houston police found the body of Mario Hurtado in a store parking lot. An investigation into the homicide ensued. IV RR. 264-67.

On March 2, 1995, Johnny Morgan was stopped by a Texas Department of Public Safety trooper for speeding while driving through Navarro County. IV RR. 111-12. Daniel Lindsey, the actual owner of the vehicle, was a passenger in the vehicle at the time. IV RR. 117. After performing a routine records check on Lindsey, the trooper arrested Lindsey pursuant to an outstanding warrant and obtained verbal consent to search the vehicle. IV RR. 118-19. The trooper found two bundles of cocaine. IV RR. 120. The trooper placed Morgan and Lindsey under arrest for aggravated possession of cocaine. IV RR. 123. Ultimately, Lindsey took responsibility for the cocaine, informing the police that Morgan had nothing to do with the cocaine, its purchase, or the eventual plan to sell it. IV RR. 158.

On March 3, 1995, Lindsey gave a written statement to the police wherein he confessed to being involved with Petitioner Bullock in the dealing of cocaine. IV RR. 157. Lindsey

stated that he and Bullock had an agreement to purchase ten kilograms of cocaine from Mario Hurtado on March 1, 1995. Lindsey stated that he was in Oklahoma City that night and that Bullock was to receive the cocaine from Hurtado. Problems arose, however, at the time of exchange as Hurtado apparently only came to the exchange with two kilograms of cocaine. A struggle ensued, and Bullock was badly beaten. However, he ultimately shot and killed Hurtado. Lindsey stated that Bullock dumped Hurtado's body in a store parking lot and then drove to a restaurant outside Houston to wait for help. Lindsey further stated that Johnny Morgan drove him to meet Bullock in Conroe, Texas that night. After Lindsey and Bullock spoke about the events of the evening, Bullock gave the two kilograms of cocaine to Lindsey to take back with him to Oklahoma. Bullock requested Lindsey wire him one to two thousand dollars upon his return to cover medical expenses. IV RR. 164-69.

Lindsey pleaded guilty to the possession charge on August 7, 1995, received a ten-year prison sentence, and did not file a notice of appeal. *Bullock v. State*, 982 S.W.2d 579, 581 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd).[1]

On March 6, 1995, Bullock also gave a written statement to the police in which he admitted meeting with Mario Hurtado on March 1, 1995, to purchase ten kilograms of cocaine. He stated that he did not bring any money with him to the exchange, but rather planned to arrange a payment plan

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[1] The relevant portion of Lindsey's confession to the police is set forth in the court of appeals's opinion.

with Hurtado. Bullock stated that this angered Hurtado who then pulled out a gun and threatened to kill him. Hurtado and Bullock struggled, and Bullock eventually shot and killed Hurtado. Bullock stated he then drove to some business buildings and dumped Hurtado's body. Bullock further stated he called Lindsey after the shooting and told him he had the cocaine. Finally, Bullock stated that on the following day he gave the two kilograms of cocaine to Lindsey. IV RR. 289-93.

Although initially charged with the murder of Mario Hurtado, Bullock was not tried for that crime. Bullock was charged with and convicted of possession with intent to deliver at least 400 grams of cocaine. IV RR. 109-11. Included in the evidence admitted by the prosecution at trial were two out-of-court confessions by Daniel Lindsey and Bullock's own confession to the police. IV RR. 109, 288. Lindsey's statements were admitted over Bullock's objection after Lindsey asserted his Fifth Amendment privilege and refused to testify. IV RR. 109.

Bullock appealed his conviction to the court of appeals alleging, among other things, that his Sixth Amendment right to cross-examine his accuser was violated by the admission of Lindsey's out-of-court statements. The court of appeals affirmed the admission of the statements and held that Bullock's own statement mirrored Lindsey's statements, thus establishing their inherent reliability. *Bullock*, 982 S.W.2d at 582-83. Bullock then filed a petition for discretionary review with the Texas Court of Criminal Appeals, which denied review.

ARGUMENT

THE TEXAS COURT OF APPEALS'S DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT CONCERNING A CRIMINAL DEFENDANT'S RIGHT TO CONFRONT HIS ACCUSER.

Bullock attempts to convince the Court to review his conviction for possession of cocaine with intent to deliver by manufacturing a conflict between the court of appeals's decision and the decision of this Court in *Lilly v. Virginia*, 119 S.Ct. 1887 (1999). Bullock argues his Sixth Amendment right to cross-examine his accuser was violated when the trial court admitted into evidence the statements of an unavailable accomplice, Daniel Lindsey, which were taken while Lindsey was in police custody and which inculpated Bullock. Pet. at 3-4.

Bullock's argument is fallacious because the court of appeals correctly applied this Court's Confrontation Clause jurisprudence as established in *Ohio v. Roberts,* 448 U.S. 56 (1980), *Lee v. Illinois*, 476 U.S. 530 (1986), and recently reaffirmed in *Lilly.* 119 S.Ct. at 1894. There exists no conflict between the court of appeals's decision and this Court's Confrontation Clause jurisprudence.

In *Roberts*, the Court summarized the general framework of the Confrontation Clause analysis: the veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when (1) "the evidence falls within a firmly rooted hearsay exception" or (2) it contains "particularized guarantees of trustworthiness" such that adversarial testing through cross-

examination would be expected to add little, if anything, to the statements' reliability. *Roberts*, 448 U.S. at 66.

The Court in *Lee v. Illinois* dealt specifically with the out-of-court statements of criminal accomplices. In *Lee*, the Court rejected Illinois's argument that admitting the confession of a co-defendant in a joint trial for double murder fell within a firmly rooted exception to the hearsay rule, namely the declaration-against-penal-interest exception. *Lee*, 476 U.S. at 544. Referring to the declaration-against-penal-interest exception, the Court said, "that concept defines too large a class for meaningful Confrontation Clause analysis." *Lee*, 476 U.S. at 544 n.5.

Finally, in *Lilly v. Virginia*, a plurality of this Court decided that "accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence." *Lilly*, 119 S.Ct. at 1899. Such statements are presumed to be unreliable and inadmissible. *Id.* at 1900. Although the plurality expressed some doubt as to whether the presumption against admission of an accomplice's out-of-court statement could ever be rebutted, *id.*, it noted the Confrontation Clause does not impose a blanket ban on the state's use of nontestifying accomplice statements that incriminate a defendant. Rather, the Confrontation Clause simply requires the state to satisfy the second prong of the *Roberts* test in order to introduce such statements. *Id.* at 1899 n.5.

Bullock erroneously asserts in his petition that the court of appeals contravened this Court's decision in *Lilly* by holding that:

> hearsay statements of the non-testifying accomplice did not violate the confrontation clause because by falling under a traditional hearsay rule exception (statement against penal interest), the reliability of the statements could be presumed.

See Pet. at 3 (citations omitted). Further, Bullock wrongly contends that the court of appeals improperly relied on other evidence presented at trial to corroborate Lindsey's out-of-court statements regarding Bullock's involvement in the crime of possession with the intent to deliver. *Id.* at 4. The court of appeals properly applied this Court's Confrontation Clause jurisprudence. The court of appeals plainly stated:

> We can usually presume reliability when the declarant's statement falls under a traditional hearsay rule exception. However, a statement against the declarant's penal interest is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. *A co-defendant's statement against penal interest is presumed unreliable, however, to the extent it inculpates a defendant.*

Bullock, 982 S.W.2d at 582 (citations omitted) (emphasis added). Thus, the court of appeals began with the presumption that Lindsey's statements were unreliable and inadmissible and proceeded to analyze whether adequate indicia of reliability existed to rebut that presumption and to warrant the admission of the statements as required by the Court in *Roberts*. *See Roberts*, 448 U.S. at 66.

In particular, the court of appeals focused on the fact that

Bullock's own statement was consistent with Lindsey's statements with respect to the elements of the drug charges against Bullock. *Bullock,* 982 S.W.2d at 582-83. Citing to *Cruz v. New York*, 481 U.S. 186, 192-93 (1987), the court of appeals stated that reliability is shown when a defendant's own statement confirms the essential facts of a co-defendant's statement. *Bullock,* 982 S.W.2d at 582. In *Cruz,* the Court acknowledged that when an accomplice's confession "confirms essentially the same facts as the defendant's own confession it is more likely to be true." *Cruz*, 481 U.S. at 192.

Indeed, Bullock's statement to the police is entirely consistent with Lindsey's statements regarding the elements of the charges brought against Bullock. Bullock admitted in his statement to the police that he intended to meet Hurtado on March 1, 1995, to purchase 10 kilograms of cocaine. He further stated that when he met with Hurtado, only two kilograms were delivered. He stated that he did not have any money with him in order to pay for the cocaine and when Hurtado discovered this he became angry and pulled out a gun. Bullock stated that there was a struggle, during which Hurtado was shot and killed, that he took Hurtado's body elsewhere and dumped it, and that the next day he gave Lindsey the cocaine.

The court of appeals properly applied this Court's Confrontation Clause jurisprudence by assuming initially that Lindsey's out-of-court statements were inadmissible and then analyzing whether the statements possessed "particularized guarantees of trustworthiness" to justify their admission as required by *Roberts*. *Roberts*, 448 U.S. at 66. The *Roberts* test was satisfied and the inherent trustworthiness of Lindsey's

statements was evidenced by the fact that Bullock's own statement to the police was entirely consistent, in relevant part, with Lindsey's statements. Bullock's real argument is not that the court of appeals applied the wrong legal standard, but that he believes the court reached the wrong result in applying that standard to the facts before it.

But, even if the court of appeals erred in admitting Lindsey's statements, this case is a poor vehicle for the Court to elaborate on its Confrontation Clause jurisprudence because any error was harmless beyond a reasonable doubt. As explained above, Lindsey and Bullock's statements were entirely consistent with respect to the facts relevant to the drug possession charges brought against Bullock. Consequently, Bullock's own statement was sufficient evidence to support his conviction for possession with intent to deliver, and Lindsey's statements were, largely, cumulative.

CONCLUSION

The court of appeals properly applied this Court's Confrontation Clause jurisprudence in determining that the admission of Lindsey's confessions was appropriate. Bullock's true disagreement with the court of appeals's opinion concerns its interpretation of the facts, not its rendition or interpretation of the law. For the reasons stated, Respondent respectfully requests that Bullock's petition for writ of certiorari be denied.

Respectfully submitted,

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